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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 594

CITY OF KANSAS CITY, KANSAS, DON C. McCOMBS, FRANCIS BLAKE AND GEORGE T. DARBY, COMMISSIONERS, ETC., ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT AS TO JURISDICTION.

ALTON H. SKINNER,
BLAKE A. WILLIAMSON,
HENRY N. ESS,
T. W. BOCKES,
ROBERT F. MAGUIRE,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

Civil Action No. 440

Filed August 30, 1940. 11:45 A. M. J. C. Collet.

UNITED STATES OF AMERICA; THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY, AND GUY A. THOMPSON, AS ITS TRUSTEE; AND CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, AND FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, AS ITS TRUSTEES, AND CITY OF KANSAS CITY, MISSOURI,

Plaintiffs-Appellees,

vs.

UNION PACIFIC RAILROAD COMPANY, A CORPORATION; THE CITY OF KANSAS CITY, KANSAS, A MUNICIPAL CORPORATION; DON C. McCOMBS, FRANCIS BLAKE AND GEORGE T. DARBY, COMMISSIONERS, AND CONSTITUTING THE GOVERNING BODY OF SAID CITY, ET AL.,

Defendants-Appellants.

BEFORE THE HONORABLE J. C. COLLET, UNITED STATES DISTRICT JUDGE.

STATEMENT AS TO JURISDICTION.

1. The jurisdiction of the Supreme Court of the United States is invoked under Section 238 of the Judicial Code,

as amended (43 Stat. p. 938, Chap. 229, Sec. 238, par. 1, Act of Feb. 13, 1925; Title 28 U. S. Code Annotated, Sec. 345); and Chapter 428 of the Act of June 25, 1910 (36 Stat. p. 854; Title 49 U. S. Code Annotated, Sec. 44), commonly known as the "Expediting Act", as amended by Sec. 291, Chapter 231, Act of March 3, 1911, 36 Stat. p. 1167, which latter Act abolished Circuit Courts and made laws theretofore relating to Circuit Courts applicable to District Courts; and Sec. 2, Chap. 544, Act of Feb. 11, 1903 (32 Stat. p. 823, Title 49 U. S. Code Annotated, Sec. 45; also amended by Sec. 291, Chap. 231, Act of March 3, 1911, 36 Stat. p. 1167).

2. The Statutes of the United States and the Statutes of the State of Kansas, the validity and application of which are involved are:

(Statutes of the United States):

(a) Chapter 708, Section 1, 32 Stat. 847, Act of February 19, 1903 (Title 49 U. S. Code Annotated, Sec. 41, subpar. (1), commonly known as Section 1, subpar. (1) of the Elkins Act, the pertinent portion of which is as follows:

> "Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and

upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: Provided, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *"

(b) Chapter 708, Sec. 3; 32 Stat. p. 848, Act of Feb. 19, 1903, as amended by Sec. 291, Chapter 231, Act of March 3, 1911, which latter Act abolished Circuit Courts and made laws relating thereto applicable to District Courts (Title 49 U. S. Code Annotated, Sec. 43), commonly known as Section 3 of the Elkins Act, the pertinent portion of which is:

"Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the

published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the District Court of the United States, sitting in equity, having jurisdiction. * * * Whereupon it shall be the duty of the court summarily to inquire into the circumstances upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs and process, which said orders, writs and process may be enforceable as well against the parties interested in the traffic as against the carrier subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings. * * * Provided, that the provisions of Sections 44 and 45 shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission"; and

(c) The following Sections of the Interstate Commerce Act of February 14, 1887, as amended by the Act of February 28, 1920:

(1) Chapter 91, Sec. 404; 41 Stat. p. 479; (Title 49 U. S. Code Annotated, Section 2):

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or prop-

erty or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

(2) Chapter 104, Sec. 3, 24 Stat. p. 380; (Title 49 U. S. Code Annotated, Subparagraph (1), Section 3):

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

(3) Chapter 3591, Sec. 6, par. 7, Act of June 29, 1906, 34 Stat. p. 587, amended by Chapter 91, Sec. 411; 41 Stat. 483; (49 U. S. Code Annotated, Subparagraph (7), Section 6):

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the

rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

(4) Chapter 128, Sec. 12, Act of Feb. 10, 1891, 26 Stat. p. 743, as amended by Chapter 91, Sec. 415, 41 Stat. 484; (Title 49 U. S. Code Annotated, Subparagraph (1), Section 12):

"The Commission created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this chapter, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

(Statutes of the State of Kansas):

(a) Section 13-1242 G. S. Kansas, 1935:

"Provision shall be made by the governing body of such city for the payment of said bonds, by fixing rates

and charges for the use of and the services to be rendered by such property and facilities, which rates and charges so fixed shall be sufficient to pay all expenses of the city in connection therewith and cover the cost of operation and repairs, pay all interest charges upon all indebtedness created for the purpose of improving, constructing, reconstructing, repairing or improving of such public levee and the improvements and facilities thereon for which such revenue bonds were issued to so improve, construct, reconstruct or repair and to provide a sinking fund sufficient to pay off such indebtedness at maturity."

(b) Section 13-1243 G. S. Kansas, 1935:

"The governing body of such city, is hereby empowered and authorized to enter into an agreement in writing with any person, firm or corporation to erect and construct on its public levee, improvements and facilities authorized and mentioned in this act and lease the same for a term of not to exceed ninety-nine years for such rental and upon such conditions as in the judgment of said governing body will be to the best interest of such city, provided the rent fixed by any such agreement and lease shall be sufficient to liquidate and pay all expenses of the city connected therewith and the principal and interest of all revenue bonds issued or to be issued to pay the full cost of such improvements and facilities so leased."

3. The Final Decree sought to be reviewed was entered by the District Court of the United States for the Western Division of the Western District of Missouri, on July 13, 1940. Petition for appeal is herewith presented on the 30th day of August, 1940.

4. This action was originally instituted on December 29, 1939 by the United States of America, represented by the United States District Attorney for the Western Judicial District of Missouri, acting under the direction of the At-

torney General of the United States at the request of the Interstate Commerce Commission, against Union Pacific Railroad Company, a common carrier by railroad; the City of Kansas City, Kansas, a municipal corporation, and certain of its officers; a number of produce dealers engaged in the purchase and sale of produce in the greater Kansas City territory; William Fean; Joseph DeOreo; and Leonard Ulmann, to enjoin alleged violations of the Interstate Commerce Act and the Elkins Act. The authority of the United States to maintain the action and the jurisdiction of the District Court to entertain it were based upon the Statutes of the United States set forth in Paragraph 2 hereof.

5. Upon motion of the United States therefor the District Court ordered that the City of Kansas City, Missouri; The Atchison, Topeka & Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Missouri Pacific Railroad Company, and Guy A. Thompson, as its Trustee; and Chicago, Rock Island & Pacific Railway Company, and Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as its Trustees, be made parties plaintiff, and said parties thereupon joined in the allegations of the Complaint and prayer thereof. Thereafter the District Court denied the motion of defendant Union Pacific Railroad Company to vacate said order.

6. It was alleged in the complaint that the defendant City of Kansas City, Kansas, and its defendant officers, had participated with defendant Union Pacific Railroad Company in promoting the construction of a wholesale produce terminal on the Public Levee in Kansas City, Kansas; that the cost of construction was financed in part by a grant of $1,710,000.00 by the Public Works Administration of the United States and from proceeds of Public Levee Revenue Bonds issued by defendant City and purchased by defendant Union Pacific Railroad Company; that said Kansas

City Food Terminal was served only by the lines of defendant Union Pacific Railroad Company; that to induce defendant produce dealers to move from their established places of business in Kansas City, Missouri, and to become tenants in said Kansas City Food Terminal, offers of free and reduced rentals and cash payments have been made to said produce dealers. It was charged in the complaint that such contemplated payments to defendant produce dealers were to be made by defendant City from Public Levee Revenue Funds derived chiefly from advance rentals paid into said fund by defendant Union Pacific Railroad Company (lessee of team track yard) or by other tenants of said facilities at the instance or request of said defendant. It affirmatively appears from the allegations of the complaint that the power and authority of the defendant City of Kansas City, Kansas, to make said payments from its Public Levee Revenue Funds and grant such reduced rentals under the Statutes of the State of Kansas had been established by the decision of the Supreme Court of Kansas in a *quo warranto* proceeding brought by the Attorney General of said State against the defendant City, to determine the scope of its power and the validity of its proposed action (*State ex rel. Parker v. Kansas City*, 151 Kans. 3).

7. Summarily, it was charged in the complaint that the sole purpose of defendants in constructing said Kansas City Food Terminal was to remove the produce business from Kansas City, Missouri, to Kansas City, Kansas, thereby resulting in additional traffic for defendant Union Pacific Railroad Company and a loss of traffic by plaintiff railroads; that the Interstate Commerce Act and the Elkins Act had been violated by the defendants in the following particulars:

(a) Defendant Union Pacific Railroad Company was a participant with the defendant City of Kansas City, Kansas, as a joint venturer in the promotion, development and

operation of said Kansas City Food Terminal and in said capacity is jointly and equally responsible with defendant City for the alleged offers, gifts and grants of cash payments, free rentals and reduced rentals made or offered to defendant produce dealers;

(b) Defendant Union Pacific Railroad Company, as the holder of said $3,000,000 principal amount of revenue bonds issued by defendant City, waived its right under Ordinance No. 30206 of said City, authorizing the issuance thereof, to insist that the revenues of the Public Levee be applied toward the payment of the principal and interest on its bonds and not to defendant produce dealers, and because of such waiver defendant Railroad Company is a participant in such payments;

(c) That in assisting the City to raise advance rentals from tenants of the produce terminal, to be used for the purpose of making cash payments to produce dealers, defendant Railroad Company is a participant and equally responsible with defendant City;

(d) That the plan evolved to make such payments and to provide for such reduced rental was a subterfuge, scheme and device for making unlawful payments and gifts to shippers and receivers of freight, whereby defendant Union Pacific Railroad Company would be caused to transport freight at less than its published tariffs and to commit discriminations forbidden by law;

(e) That defendant produce dealers in soliciting such free rentals and cash payments would be guilty of soliciting rebates, concessions and advantages, whereby defendant Union Pacific Railroad Company as a common carrier would be caused to transport freight at less than its published tariffs;

(f) That the whole course of the transactions constitutes a conspiracy on the part of all of the defendants to violate

the Interstate Commerce Act and the Elkins Act by offering, granting, giving, soliciting, accepting and receiving rebates, whereby defendant Union Pacific Railroad Company as a common carrier would be caused to transport freight at less than its duly published tariffs, and to commit discriminations forbidden by law.

In substance it was prayed that first a temporary and then a permanent injunction issue enjoining the defendants from giving or receiving any cash payments or reduced rentals, or otherwise violating said Statutes in the manner alleged, and from carrying out the alleged conspiracy whereby the arrangements mentioned were to be effectuated.

8. On December 29, 1939, the District Court granted a temporary restraining order based on the complaint, affidavits and exhibits thereto attached. A copy of said restraining order is attached hereto as Appendix "A".

9. On January 3, 1940, the District Court modified said temporary restraining order and continued it in force and effect. A copy of said modified restraining order is attached hereto as Appendix "B".

10. After the defendants had filed answers, among other things denying such alleged violations of the Elkins Act and the Interstate Commerce Act, and the issues were made, and after the court had heard the testimony on plaintiffs' application for a temporary injunction, the court rendered a memorandum opinion dated March 25, 1940, copy of which is attached hereto as Appendix "C".

11. Thereafter, on April 10, 1940, the court entered an "Order Granting Preliminary Injunction," enjoining the giving of any payments, credits or other things of value to defendants produce dealers and fixing, during the pendency of the suit and until its further order, the rents which defendant City of Kansas City, Kansas, would collect and

defendants produce dealers would pay for the rental of the facilities occupied by them in the Kansas City Food Terminal. A copy of said order granting preliminary injunction is appended hereto marked Appendix "D".

12. After hearing the evidence on final hearing and arguments the District Court entered its "Final Order Granting Permanent Injunction," on July 13, 1940, restraining and enjoining the defendants from offering, making or giving, soliciting or accepting any credits, payments or other things of value to defendants produce dealers or to other produce dealers or other persons shipping produce by railroad in interstate commerce which would amount to a gift or concession in violation of the Interstate Commerce Act or the Elkins Act, and requiring that rental for the use of facilities in said Kansas City Food Terminal shall be in such amount as will not constitute a rebate or concession to any tenant and which will yield a proper rate of return upon the full value of the market facilities as a whole. A copy of said final order granting permanent injunction is appended hereto marked Appendix "E".

13. On July 8, 1940, the District Court filed a Memorandum Opinion on Final Hearing, copy of which is appended hereto marked Appendix "F".

14. Concurrently with the entry of said "Final Order granting Permanent Injunction" the District Court on July 13, 1940, filed a Supplemental Memorandum Opinion, copy of which is appended hereto marked Appendix "G".

15. The appeal prayed for is to the Supreme Court of the United States from the "Final Order Granting Permanent Injunction," and is authorized by the statutes cited in paragraph numbered 1 of this Statement, which in express terms provide that the appeal shall be to the Supreme Court of the United States from the Final Decree of the District Court; and the cases believed to sustain the juris-

diction of the Supreme Court of the United States to determine this appeal are as follows:

United States v. *Chicago North Shore & Milwaukee Railroad Co.*, 288 U. S. 1; 53 Sup. Ct. 245; 77 L. Ed. 583;

United States v. *Elgin, Joliet & Eastern Railway Co.*, 298 U. S. 492; 56 Sup. Ct. 841;

Interstate Commerce Commission v. *Baird*, 194 U. S. 25;

United States v. *General Elec. Co.*, 272 U. S. 476; 47 Sup. Ct. 192; 71 L. Ed. 362;

Atlantic Cleaners & Dyers, Inc., et al., v. *United States*, 286 U. S. 427; 52 Sup. Ct. 607; 76 L. Ed. 1204;

Swift & Co. v. *United States*, 276 U. S. 311, 322; 48 Sup. Ct. 311; 71 L. Ed. 587;

United States v. *California Canneries*, 279 U. S. 553; 49 Sup. Ct. 423; 73 L. Ed. 838.

Respectfully submitted,

ALTON H. SKINNER,
BLAKE A. WILLIAMSON,
Attorneys for Defendants-Appellants City of Kansas City, Kansas, a Municipal Corporation; Don C. McCombs, Francis Blake, and George T. Darby, Commissioners, Constituting the Governing Body of Said City; Alton H. Skinner, Howard Payne, and Truman Schlup, Duly Appointed Officials of Said City.

HENRY N. ESS,
T. W. BOOKER,
ROBERT F. MAGUIRE,
Attorneys for Defendant-Appellant Union Pacific Railroad Company.

APPENDIX "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

Civil Action No. 440.

UNITED STATES OF AMERICA, et al., *Plaintiffs*,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., *Defendants*.

Temporary Restraining Order.

WHEREAS, in the above entitled cause, a verified complaint seeking a temporary restraining order, a temporary injunction, and a permanent injunction has been filed, and it appearing from said complaint and the affidavits of P. E. Watson, F. A. Hart, J. A. Fitzgerald, Cameron P. Varney, Hugh J. Curran, Bruce Hurd, and P. F. Marsh that the Interstate Commerce Act and the Elkins Act will be and are now being violated by said defendants and that immediate and irreparable injury, loss or damage will result to the people of the United States, including the shipping public, the city of Kansas City, Missouri, and certain of its property owners and The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, The Chicago, Rock Island & Pacific Railway Company and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, its trustees, and Missouri Pacific Railroad Company and Guy A. Thompson, its trustee, before notice can be served and hearing had thereon, such irreparable injury, loss, and damage being defined as follows:

(1) The purpose of the defendants Union Pacific Railroad Company and the City of Kansas City, Kansas, in making the illegal payments to the defendant produce dealers is clearly to persuade them to move from their present places of business in the produce district of Kansas City, Missouri, to the new Kansas City Food Terminal in Kansas City, Kansas.

(2) The defendant City of Kansas City, Kansas, has announced that it is endeavoring to make the said payments and gifts and to consummate the transactions before January 1, 1940, so that prompt action is necessary if the carrying out of the allegedly illegal arrangements is to be prevented.

(3) At the present produce district of Kansas City, Missouri, certain produce dealers do business in a market building owned by the City of Kansas City, Missouri, and certain other produce dealers do business in privately owned stores, offices, markets, and warehouses, some of which are owned by the produce dealers themselves and some by other persons. The aggregate value of the buildings, public and private, devoted to buying and selling food in said produce district is very large, amounting to approximately $10,000,000. A great part of the value of said property would be destroyed and large losses would be visited upon the produce dealers and other property owners and upon the commerce and trade of Kansas City, Missouri, should the defendants proceed in carrying out their agreement by which the defendant produce dealers are to move their places of business to the new Kansas City Food Terminal at Kansas City, Kansas, in return for payments of cash and gifts of free rental and other things of value. Said injury would be irreparable because once the defendant produce dealers have moved away from the produce district of Kansas City, Missouri, to the new Kansas City Food Terminal at Kansas City, Kansas, it is very unlikely that they will assume the expense and trouble of moving back again even if at some subsequent time a return of the payments and gifts aforesaid were ordered by this court.

(4) The major portion of the produce bought and sold in the present produce district of Kansas City, Missouri, is transported to and from said district in interstate and foreign commerce by a number of competing railroads, including defendant Union Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, The Chicago, Rock Island & Pacific Railway Company and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, its trustees, and

Missouri Pacific Railroad Company and Guy A. Thompson, its trustee. The new Kansas City Food Terminal at Kansas City, Kansas is located solely on the lines of defendant Union Pacific Railroad Company and said defendant has an advantage over the above-named competing lines with respect to traffic handled to or from said new terminal. If the defendant produce dealers are induced to move their places of business from the Kansas City, Missouri, terminal to the Kansas City, Kansas, terminal by the allegedly illegal arrangements aforesaid, the result will be to divert shipments of produce traffic of such defendant produce dealers now being transported in interstate and foreign commerce from the said competing lines to the lines of the defendant Union Pacific Railroad Company, and it appears from affidavits filed herein that such diversion would cause a loss of approximately $314,000 a year to the Atchison, Topeka and Santa Fe Railway Company, a loss of $105,000 a year to the Missouri Pacific Railroad Company, a loss of $55,000 a year to the Chicago, Burlington & Quincy Railroad Company, and substantial loss of revenue annually to the Chicago, Rock Island & Pacific Railway Company, and said loss and diversion will be a continuous one and one for which there is no adequate remedy at law.

It is necessary that a temporary restraining order be issued before notice can be served and hearing had upon the complaint herein unless said defendants are, pending such hearing, restrained as herein set forth, for the reason that said defendants are now and will continue to carry out their unlawful scheme, plan, agreement, or conspiracy, and have announced that they would carry out said scheme, plan, agreement, or conspiracy before January 1, 1940, and will do so unless restrained as herein set forth.

Now, Therefore, take notice that—

(a) All of defendants and their employees, servants, agents, attorneys and counselors are hereby temporarily restrained and enjoined from carrying out the scheme, plan, agreement, or conspiracy whereby cash payments and/or free rentals and/or other valuable considerations are or will be given and/or received in consideration of the de-

fendant produce dealers moving to the new Kansas City, Kansas, Food Terminal, and from giving and/or receiving any cash payments and/or free rentals and/or other valuable considerations in consideration of the transfer of the places of business of the defendant produce dealers to the new Kansas City, Kansas, Food Terminal.

(b) Defendants, Union Pacific Railroad Company, City of Kansas City, Kansas, Don C. McCombs, Francis Blake, George T. Darby, Alton W. Skinner, Howard Payne, and Truman Schlup, and their employees, servants, agents, attorneys, and counselors, are hereby temporarily restrained and enjoined from giving or granting, directly or indirectly, to any shipper or consignee of shipments in interstate or foreign commerce, any cash payments and/or free rentals and/or other valuable considerations to induce them to transfer their places of business to the new Kansas City, Kansas, Food Terminal.

(c) Defendant produce dealers and their employees, servants, agents, attorneys, and counselors are hereby temporarily restrained and enjoined from moving their places of business to the Kansas City, Kansas, Food Terminal in furtherance of the aforesaid scheme, plan, arrangement, or conspiracy until the further order of this court.

Further Ordered, that this temporary restraining order remain in effect until and including the 8th day of January, 1940, or until the further order of this court, and that the application for temporary injunction as prayed in the verified bill of complaint herein be set down for hearing on the 3rd day of January, 1940, or as soon thereafter as counsel can be heard.

Dated December 29, 1939.

(Signed) J. C. COLLET,
United States District Judge.

[SEAL.]

Attest: A true copy,
A. L. ARNOLD, Clerk,
By H. C. SPAULDING,
Deputy.

(Issued three forty-five P. M., December 29, 1939.)

APPENDIX "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

Civil Action. No. 440.

UNITED STATES OF AMERICA, et al., *Plaintiffs,*

vs.

UNION PACIFIC RAILROAD COMPANY, et al., *Defendants.*

Modified Temporary Restraining Order.

Whereas, in the above entitled cause, a verified complaint seeking a temporary restraining order, a temporary injunction, and a permanent injunction has been filed, and it appearing from said complaint and the affidavits of P. E. Watson, F. A. Hart, J. A. Fitzgerald, Cameron P. Varney, Hugh J. Curran, Bruce Hurd, and P. F. Marsh that the Interstate Commerce Act and the Elkins Act will be and are now being violated by said defendants and that immediate and irreparable injury, loss or damage will result to the people of the United States, including the shipping public, the City of Kansas City, Missouri, and certain of its property owners and The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, The Chicago, Rock Island & Pacific Railway Company and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, its trustees, and Missouri Pacific Railroad Company and Guy A. Thompson, its trustee, before notice can be served and hearing had thereon, such irreparable injury, loss, and damage being defined as follows:

(1) The purpose of the defendants Union Pacific Railroad Company and the City of Kansas City, Kansas, in making the illegal payments to the defendant produce dealers is clearly to persuade them to move from their present places of business in the produce district of Kansas

City, Missouri, to the New Kansas City Food Terminal in Kansas City, Kansas.

(2) The defendant City of Kansas City, Kansas, has announced that it is endeavoring to make the said payments and gifts and to consummate the transactions immediately so that prompt action is necessary if the carrying out of the allegedly illegal arrangements is to be prevented.

(3) At the present produce district of Kansas City, Missouri, certain produce dealers do business in a market building owned by the City of Kansas City, Missouri, and certain other produce dealers do business in privately owned stores, offices, markets, and warehouses, some of which are owned by the produce dealers themselves and some by other persons. The aggregate value of the buildings, public and private, devoted to buying and selling food in said produce district is very large, amounting to approximately $10,000,000. A great part of the value of said property would be destroyed and large losses would be visited upon the produce dealers and other property owners and upon the commerce and trade of Kansas City, Missouri, should the defendants proceed in carrying out their agreement by which the defendant produce dealers are to move their places of business to the new Kansas City Food Terminal at Kansas City, Kansas, in return for payments of cash and gifts of free rental and other things of value. Said injury would be irreparable because once the defendant produce dealers have moved away from the produce district of Kansas City, Missouri, to the new Kansas City Food Terminal at Kansas City, Kansas, it is very unlikely that they will assume the expense and trouble of moving back again even if at some subsequent time a return of the payments and gifts aforesaid were ordered by this court.

(4) The major portion of the produce bought and sold in the present produce district of Kansas City, Missouri, is transported to and from said district in interstate and foreign commerce by a number of competing railroads, including defendant Union Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Chicago,

Burlington & Quincy Railroad Company, The Chicago, Rock Island & Pacific Railway Company and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, its trustees, and Missouri Pacific Railroad Company and Guy A. Thompson, its trustee. The new Kansas City Food Terminal at Kansas City, Kansas, is located solely on the lines of defendant Union Pacific Railroad Company and said defendant has an advantage over the above-named competing lines with respect to traffic handled to or from said new terminal. If the defendant produce dealers are induced to move their places of business from the Kansas City, Missouri, terminal to the Kansas City, Kansas, terminal by the allegedly illegal arrangements aforesaid, the result will be to divert shipments of produce traffic of such defendant produce dealers now being transported in interstate and foreign commerce from the said competing lines to the lines of the defendant Union Pacific Railroad Company, and it appears from affidavits filed herein that such diversion would cause a loss of approximately $314,000 a year to The Atchison, Topeka and Santa Fe Railway Company, a loss of $105,000 a year to the Missouri Pacific Railroad Company, a loss of $55,000 a year to the Chicago, Burlington & Quincy Railroad Company, and substantial loss of revenue annually to The Chicago, Rock Island & Pacific Railway Company, and said loss and diversion will be a continuous one and one for which there is no adequate remedy at law.

It is necessary that a temporary restraining order be issued before notice can be served and hearing had upon the complaint herein unless said defendants are, pending such hearing, restrained as herein set forth, for the reason that said defendants are now and will continue to carry out their unlawful scheme, plan, agreement, or conspiracy, and have announced that they would carry out said scheme, plan, agreement, or conspiracy immediately, and will do so unless restrained as herein set forth.

Now, Therefore, take notice that—

(a) All of defendants and their employees, servants, agents, attorneys and counselors are hereby temporarily

restrained and enjoined from carrying out the scheme, plan, agreement, or conspiracy whereby cash payments and/or free rentals and/or other valuable considerations are or will be given and/or received in consideration of the defendant produce dealers moving to the new Kansas City, Kansas, Food Terminal, and from giving and/or receiving any cash payments and/or free rentals and/or other valuable considerations in consideration of the transfer of the places of business of the defendant produce dealers to the new Kansas City, Kansas, Food Terminal in furtherance of said scheme, plan, agreement or conspiracy.

(b) Defendant produce dealers and their employees, servants, agents, attorneys, and counselors are hereby temporarily restrained and enjoined from moving their places of business to the Kansas City, Kansas, Food Terminal in furtherance of the aforesaid scheme, plan, arrangement, or conspiracy until the further order of this court.

Further Ordered, that this temporary restraining order remain in effect until the 29th day of January, 1940, and thereafter until the further order of this court, and that the application for temporary and permanent injunctions as prayed in the verified bill of complaint herein be consolidated and set down for hearing on the 29th day of January, 1940.

Dated January 3, 1940.

(S.) J. C. Collet, United States District Judge.

(Filed in U. S. Dist. Court, W. D. W. D. Mo., Jan. 3, 1940.)

APPENDIX "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

Civil Action. No. 440.

UNITED STATES OF AMERICA, et al., *Plaintiffs*,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., *Defendants*.

Memorandum Opinion.

Application for temporary injunction in proceeding instituted by the Attorney-General at the request of the Interstate Commerce Commission to restrain alleged violations of the Elkins Act, U. S. C. A. Title 49, Sec. 41, et seq.[1]

The defendants are the Union Pacific Railroad Company, hereinafter referred to as the Union Pacific, the City of Kansas City, Kansas and its officials, hereinafter referred to as the "City," a number of wholesale produce dealers who are interstate shippers, two individual defendants characterized as promoters and the latter's attorney.

It is charged that the Union Pacific and the City and the promoters as their agents, have contracted to pay to some, and are offering to pay to other interstate shippers, and the defendant produce dealers as such interstate shippers have accepted or solicited, cash and other valuable considerations and concessions for locating at a new produce market constructed at Kansas City, Kansas on the Union Pacific's interstate railroad. The Government contends that since the payments are to produce dealers (who were engaged in that business at Kansas City, Missouri) to

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1 "* * * it shall be unlawful to offer * * * or give or to solicit, accept or receive any * * * concession, or discrimination in respect to the transportation of any property in interstate commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs * * * or whereby any other advantage is given or discrimination is practiced."

induce them to move to the new market at Kansas City, Kansas, and there engage in the interstate transportation of produce over the Union Pacific's lines, the payments are concessions and are "in respect to the transportation of property in interstate commerce" with the result that such property will be transported at a less rate than that named in the tariff (U. S. v. Union Stock Yards and Transit Co., 226 U. S. 286). The City is not a common carrier and, acting independently, has the legal right to make the payments unless forbidden by the Elkins Act. State of Kansas, ex rel. Attorney-General v. City of Kansas City, Kansas, et al., 151 Kansas 1, 98 Pac. (2d) 101. It is charged that the plan for the making of the payments by the City was conceived by it and the Union Pacific acting as joint adventurers and carried out in furtherance of the joint adventure for the benefit of both, and amounts to a device which produces the results prohibited by the Elkins Act. It is plaintiffs' contention that one of the objects of the payments to the Missouri dealers is to bring about the discontinuance of a produce market now located in Kansas City, Missouri.

After the institution of this action, upon the application of the Government, the four railroads which serve the Kansas City, Mo., market and the City of Kansas City, Mo., were allowed to join in the proceedings upon the ground that they possessed such an interest as to justify participation as distinguished from their legal right to maintain the action under the Elkins Act. There was evidence tending to show that the annual loss in revenue to these four railroads would total approximately $750,000.00 if the Missouri market was discontinued.

The City concedes that it is about to make payments amounting to approximately $140,000.00 [2] to Missouri produce dealers to induce them to move to the new market [3]

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[2] Ex. 27, Tr. p. 2800.

[3] From City Ordinance 31161, Ex. 62-b, Tr. p. 4981:

"In further consideration of the aforesaid, the Lessee hereby covenants and agrees with the City as follows: 1. That he will completely move from his present places of business in Kansas City, Missouri, into the space in the Kansas City Food Terminal (new market) herein leased not later than the 31st day of December, 1939."

but asserts that its intention was and is to make the payments independently, on its own account, for the advancement of its own market, without any agreement or understanding with the Union Pacific, and without any intention to influence the movement of interstate traffic.

The Union Pacific denies any participation in the payments.

The separate answers of the many individual defendant produce dealers in some instances admit "conversations", "conferences" and discussions with representatives of the Union Pacific relative to payments to be made, but assert that no payments were promised by the Union Pacific. The answer of the defendant Litman alleges the consummation of an agreement with the City for cash payments to him without knowledge of any conspiracy. He further asserts that any action of this Court which would for any cause prevent him from receiving the agreed payment from the City will deprive him of his property without due process of law. Other issues presented are collateral and incidental.

The determination of the cause will depend upon (1) whether the payments are concessions "in respect to" interstate transportation and (2) are devices resulting in concessions or discriminations to interstate shippers. Since the City contends that the market is its individual enterprise and asserts full and sole responsibility for the payments which it concedes it has offered and contracted for, no good purpose would be served in reviewing the evidence bearing upon the City's activities. The facts relative to the interest and participation of the Union Pacific in the project and the joint nature of the enterprise are as follows:

Late in December, 1936, defendants Joseph DeOreo and William Fean who had theretofore promoted the construction of wholesale fresh fruit and vegetable markets [4] conferred with a General Agent of the Union Pacific at Cleveland, Ohio, relative to a suitable locality for another such enterprise. They were referred to another agent of the Union Pacific at Kansas City.[5] One of the termini of the

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[4] Ex. 2, p. 6.

[5] Ex. 2, pp. 1-7.

Union Pacific was at Kansas City, Kansas, where it owned a tract of land known as the Fairfax District adjoining a tract owned by the City known as the Public Levee.[6] Both of these tracts were or could be served by the Union Pacific.[7] It was the opinion of an executive of the Union Pacific that the Public Levee was the more suitable location.[8] Messrs. DeOreo and Fean were shown both of these tracts as well as others by the Kansas City representatives of the Union Pacific. The Public Levee was selected as the most desirable. The Union Pacific demonstrated much interest in the establishment of the proposed market on its line.[9] Within a short time the officials of the Union Pacific investigated the financial standing and reputation of DeOreo and Fean,[10] formulated a tentative general plan of financing,[11] obtained plans of other markets,[12] considered general plans for this market,[13] examined the pertinent statutory law of Kansas, assisted in the preparation of amendments thereto necessary to authorize the construction of this market in the manner planned,[14] assisted in securing the introduction of a bill in the Kansas Legislature making those amendments,[15] conferred with a prospective purchaser of bonds to be issued by the City for the construction of the market,[16] interested the City officials in the project,[17] introduced DeOreo and Fean to those officials,[18] obtained estimates of costs,[19] and architects per-

[6] Ex. 2, p. 3.
[7] Ex. 2, p. 41.
[8] Ex. 2, p. 2.
[9] Ex. 2, pp. 2, 3, 6, 12, 16, 17.
[10] Ex. 2, p. 13.
[11] Ex. 2, p. 9.
[12] Ex. 2, p. 11.
[13] Ex. 2, p. 18.
[14] Ex. 2, p. 22.
[15] Ex. 2, p. 24.
[16] Ex. 2, p. 36.
[17] Ex. 2, p. 17.
[18] Ex. 2, p. 16; Tr. p. 892, 1111, 1112.
[19] Ex. 2, p. 325.

spective,[20] conferred with Federal Public Works Administration attorneys relative to necessary legislation,[21] and prepared required amendments,[22] developed plans for the construction of yard facilities,[23] costing approximately $300,000.00,[24] analyzed freight handling by all railroads at Kansas City, Missouri, and Kansas City, Kansas, of fruits and vegetables and prepared estimates of additional revenue to be derived by the Union Pacific from the construction of the market,[25] assisted in obtaining the passage of the necessary legislation and the signature of the bill by the Governor,[26] and undertook to forestall anticipated opposition from Kansas City, Missouri,[27] all within three or four months from the time the subject was first mentioned. It advanced substantially all of the promotion expenses totaling more than $20,000.00, including advances (or conditional loans) to DeOreo and Fean,[28] the expense of advertising the project,[29] inspection trips to other markets,[30] and of numerous trips to Washington by city officials and others in connection with the City's application for a grant of public funds.[31] It prepared or collaborated in the preparation of the application for the grant,[32] and furnished data supporting the application,[33] furnished much

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[20] Ex. 13, pp. 7-9.

[21] Ex. 13, p. 7.

[22] Ex. 2, pp. 27-29.

[23] Ex. 13, p. 11.

[24] Ex. 39, p. 1; Ex. 13, p. 14.

[25] Ex. 2, pp. 31-32.

[26] Ex. 13, p. 13.

[27] Ex. 2, pp. 46, 47; Ex. 13, p. 143.

[28] Ex. 6, p. 9.

[29] Ex. 21, p. 28.

[30] Ex. 2, pp. 40, 45; Ex. 13, p. 67.

[31] Ex. 2, pp. 54, 59; Ex. 13, p. 67 (The City at no time has recognized any obligation or responsibility for these expenses except for the personal expense of the employees—See Mr. Skinner's testimony).

[32] Ex. 2, p. 60—It appears from the minutes of the Board of City Commissioners (Ex. 62-a, p. 3) that the application was not presented to at least one of the three commissioners until the night of the meeting when the Board was requested to pass the resolution making the application.

[33] Ex. 6, p. 10.

of the engineering advice and direction,[34] selected the architects,[35] controlled the cost of the project[36] and type of construction,[37] directed the activities of Mr. Fean[38] and Mr. DeOreo,[39] and planned and supervised the project from beginning to end.[40] It assisted in the preparation of the form of leases,[41] procured the execution of many leases,[42] and dictated the rental charges,[43] took a leading part in the negotiations culminating in the leasing of the cold storage plant, the largest single source of revenue of the produce market,[44] and when the private interests who were expected to purchase the revenue bonds for the principal part of the financing of the project declined to purchase[45] unless the Union Pacific guaranteed the income[46] the Union Pacific rather than make this guaranty elected to purchase the bonds[47] in order to insure the success of the project.[48]

The advantages of the public levee site because of freedom from taxation and the benefit of governmental assistance to the City in financing were recognized by the Union Pacific at the inception of the plan.[49] Friendly relations already existed with the City[50] and the latter was readily interested in the project as it had a natural interest in the development of its public levee and the addition of a sub-

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[34] Ex. 13, p. 143.

[35] Ex. 10, p. 27; Ex. 62a, p. 1.

[36] Ex. 13, p. 149.

[37] Ex. 13, pp. 170, 179, 198, 201, 202; Ex. 10, pp. 27, 28.

[38] Ex. 13, p. 154.

[39] Ex. 13, p. 153.

[40] Ex. 14, pp. 28, 34; Ex. 15, pp. 6-8, 12, 32; Ex. 12, pp. 21, 28.

[41] Ex. 13, p. 90.

[42] Ex. 62a, p. 41.

[43] Ex. 5, pp. 5, 10.

[44] Ex. 17, Tr. p. 727.

[45] Ex. 6, pp. 44, 47, 50; Ex. 7, p. 4. Testimony of Mr. Ketcham, Tr. pp. 759-760.

[46] Testimony of Mr. Cravens, Tr. pp. 528, 536, 542, 543.

[47] Ex. 7, pp. 7-11.

[48] Ex. 7, pp. 27, 19.

[49] Ex. 2, p. 9, Par. 5.

[50] Ex. 2, p. 4, Par. 5.

stantial industry. The new market as planned and later constructed is designed for handling trans-continental carload shipments of fresh fruits and vegetables. Ordinarily, shipments are not consigned to any consignee at the market. Inspection facilities are furnished and upon inspection the produce is either purchased by a wholesale dealer for local distribution or the car diverted to some other distant market. Brokers have facilities at the market and upon purchase divert carloads to designated consignees. Approximately 80% of the traffic arriving at the market is diverted. If shipments come to the market from other rail lines a charge of $6.20 per car is made by the Union Pacific on all cars going in to the market and a like charge for outgoing cars. If the car is unloaded the charge is $13.20. These charges are absorbed by the line-haul carrier. Facilities are also furnished for sale of small quantities of produce at what is referred to as "farmers stalls."

Across the river in Kansas City, Missouri, a combined wholesale and retail produce market had existed for seventy-five years or more.[51] In many respects it was not well arranged or of modern type.[52] The Union Pacific, DeOreo and Fean, and the City all realized early that a division of the wholesale business between the existing market and the one proposed would be fatal to the success of both.[53] It was therefore planned by the Union Pacific and other interested parties that the produce dealers located at the Missouri Market would be induced to move to the new market.[54] Opposition to this plan was anticipated,[55] hence the early developments of the plan were carefully clothed with the utmost secrecy possible.[56] As the purpose of the proponents of the new market became known the antici-

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[54] Ex. 14, pp. 27, 29, Par. 10, 30, Par. 19. The unsigned summary appearing in Ex. 14 at pp. 28-32 is identified as Mr. Reed's at page 35 of Ex. 14. Ex. 9, p. 1, Par. 1; Ex. 8, p. 4, Par. 4; Ex. 2, p. 46.

[55] Ex. 14, p. 31, Par. 21a.

[51] Ex. 2, p. 4; Ex. 14, p. 29; Ex. 20, p. 12.

[52] Ex. 2, p. 4.

[53] Ex. 14, p. 27; Ex. 9, p. 1; Ex. 8, p. 4, Par. 4; Tr. pp. 4286-4287, 4292-4302.

[56] Ex. 28, p. 22; Ex. 2, p. 45; Ex. 14, p. 7.

pated opposition developed.[57] The campaign for the enlistment of the Missouri dealers to the new enterprise henceforward was open and intense.[58] The efforts of the representatives of the Union Pacific and the City to meet and counteract the opposition to the plan to move the Missouri dealers to the new market were directed by the Union Pacific,[59] were able and ingenious,[60] but were none-the-less honorable and untainted by fraud or chicanery.

As the new market neared completion it was evident that methods more impelling than persuasion or advertisement[61] would be necessary as the desired and necessary number of Missouri dealers had not been definitely committed to the plan to move to the new market. Other methods involving payments or concessions were not unknown to the Union Pacific.[62] The executives of the Union Pacific were not un-

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[57] Ex. 2, p. 60; Ex. 3, pp. 2, 5-6.

[58] Ex. 3, pp. 9-12; Ex. 4, pp. 1, 8, 21-25; Ex. 5, pp. 8-9, 11-14, Tr. 1144-1152.

[59] Ex. 4, p. 15; Tr. 395; Ex. 14, p. 27; Ex. 13, pp. 67, 215.

[60] Ex. 3, pp. 5-6, 8; Ex. 14, pp. 17-32; Tr. 1029-1037, 1129-1138; Ex. 9, pp. 8-9, 15-17.

[61] Ex. 12, pp. 21, 28; Ex. 16, p. 7; Tr. 433-434, 4727-4728.

[62] From Mr. Reed's summary, Ex. 14, p. 30: "The apparent danger in the present situation is that of having a 'split market' with a division of retail, wholesale, jobbing, and brokerage business between the two markets. Consequent confusion to the trade, the railroads, and the industry generally would result. There seems to be a good reason to be apprehensive as to this situation; however, generally speaking 'the trade' will move, as evidenced by experience at Cleveland, Buffalo, and Albany, N. Y. They will go where the larger volume is handled, the costs are lower, and the facilities are better, or if they are paid for going. Information developed at Buffalo indicates that the railroads involved in the produce terminal actually bought unwanted and unneeded properties of dealers and commission merchants in order to get them to go to the new location."

"If the levee and proposed food terminal is decided upon and the U. P. R. R. enters the arrangement and program it would seem to this writer that the railroad should be prepared for a long, drawn-out political and business fight, with reprisals and retaliation of all kinds being resorted to by the city, the property owners, and politicians. The railroad should be prepared to and might have to buy unwanted properties in order to make certain and secure the investment in the new food terminal tracks and facilities. Our executives should know and recognize all these facts and the possible, even probable, conditions and developments that will take

mindful, however, of the prohibitions of the Elkins Act.[63] An opinion was given by the legal department of the Union Pacific shortly before the City knew of any necessity to pay dealers to move,[64] to the effect that payments made by the City to shippers would not constitute a violation of that Act.[65] Advice given the City officials by an executive of the Union Pacific that the City could legally pay Missouri dealers to move to the new market may have suggested the method, later adopted, of attempting to circumvent the Elkins Act by the payments being made by the City.

But the public approval and the legality of such payments by the City were doubtful. The first was sought[66] and obtained[67] by the assistance of a committee of prominent citizens selected by the City to consider the matter. The legality of the payments by the City was established by a

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place. In order to insure the success of a food or produce terminal market it is necessary to have at least 55 per cent of the trade in numbers locate and 75 per cent of volume handled to be at the new location. Experiences of produce terminal markets in Detroit and Buffalo—split markets—are good examples of an undesirable and costly situation."

[63] Ex. 2, p. 51; Ex. 3, p. 12; Ex. 10, p. 48; Ex. 21, p. 3.

[64] Tr. 389, 4711.

[65] UNION PACIFIC SYSTEM—TELEGRAM.

Ex. 10, p. 48; Tr. 4711, 389.

Denver, June 28, 1939.

"Henry N. Ess,
Kansas City, Mo.

T. W. Boekes, Omaha
J. L. Haugh, Denver

"TWB is telephoning you regarding problem at KC. If city in Kansas can lawfully commit itself to railroad the latter should be safe in advancing funds to city, and city will then have its own relation with its prospective tenants. Some of the leading cases involving the Elkins Act are 241 Fed. 26, wherein court makes pronouncement QT The cases show that it is the law that any pecuniary inducement held out to a shipper to procure his business over a particular railroad is or may be a rebate or concession within the prohibition of the Elkins Act UNQT. See also 226 Fed. 713 and 226 U. S. 286 and 283 U. S. 511 and 1918 A. 798 and 277 Pa. 235. Orig. H. N. Ess Cy. TWB JLH A365.

A. C. SPENCER (Western General Counsel).

[66] Ex. 12, p. 14, 19, 24; Ex. 13, pp. 219; Tr. 3145, 3297-3298; 3484-3485.

[67] Ex. 13, pp. 223-228.

test suit in the Supreme Court of Kansas expeditiously presented [68] and at least partially directed [69] by the Union Pacific.

After the decision of the Supreme Court of Kansas the City considered itself in a legal position to make the payments to the Missouri dealers but was without proper funds with which to make those payments. A tenant had already been secured for the cold storage unit of the market [70] at a contracted annual rental of approximately $37,500.00 per annum to commence upon completion and occupancy of the leased facilities.[71] With the full knowledge, approval and at least some active assistance [72] of the Union Pacific the City negotiated an agreement with that tenant to pay $80,000.00 cash to the City as advance rent [73] for the specific purpose of being used to make the contemplated payments to Missouri dealers.[74]

The negotiations with the Missouri dealers relative to payments were handled in some instances by an executive of the Union Pacific,[75] sometimes by a committee of three of which that executive was one,[76] frequently by DeOreo during periods when he was receiving regular advancements of $300.00 and $350.00 per month,[77] and at a two-day session of an investigating committee composed of City officials.[78]

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[68] Ex. 12, pp. 32-33; Tr. 3301-3303, 3361-3363, 3486-3489.

[69] Ex. 12, p. 33; Tr. 3303-3305, 3364-3365.

[70] Ex. 17, pp. 32-33, 36; Tr. 661.

[71] Ex. 62-B, pp. 72-76, 82-83.

[72] Ex. 12, pp. 10-11, 17, 35; Ex. 13, p. 222; Tr. 663, 703-706, 3152, 3279, 5355-5356, 5383-5419.

[73] Ex. 62-B, pp. 94-96, 99-100.

[74] Ex. 63, Schedule 2-A, footnote, Tr. 3160.

[75] Ex. 12, p. 12; Ex. 16, p. 4; Tr. 387-397, 432-435, 460-461, 1062-1073, 1084-1086, 2365-2368, 4667-4685.

[76] Tr. 408-414, 426-428, 461-480, 769-774, 1061-1062, 1086-1089, 2485-2488, 2495-2499, 4686-4691.

[77] Tr. 827-829, 1028-1043, 1083-1084, 1129-1144, 2502-2507, Exhibits 86, 89, 90, 105.

[78] Ex. 105, Tr. 2211-2224, 3060-3079.

The Union Pacific recognized that the Elkins Act prohibited payments by it to the Missouri dealers.[79] When negotiations by an official of the Union Pacific or the Committee of three with those parties resulted in a tentative understanding or agreement as to amounts which should be paid the dealers to move, the dealers were told that the Union Pacific could not pay them but the matter would be submitted to the City. The City made an estimate of the total amount of concessions necessary. This estimate was based upon a report of the Committee of three which was prepared and submitted by the Union Pacific member. Ordinances were passed authorizing and directing payments based on this estimate [80] upon the execution of a contract by the dealer agreeing to move to the new market [81] and a bond guaranteeing the performance of the contract.[82] The payments which the City proposes to make are not to be made to all dealers at the Missouri Market but only to a sufficient number of the more important or more influential to result in the discontinuance of the Missouri wholesale market.[83] In determining the amount of the proposed payments items such as expense of moving, the settlement of unexpired leases, the value of abandoned fixtures, and in some instances good will at the old location, were considered.[84] The testimony of several dealers with whom negotiations were conducted warrants the conclusion that the primary objective of those who conducted or took part in the negotiations was not the ascertainment of the loss or expense to the dealer of moving, but was the ascertainment of the amount necessary to be paid to bring about the move.[85]

The interest of the Union Pacific in the success of the project is further demonstrated by the financing of the

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[79] Ex. 12, p. 12; Tr. pp. 4585-4587.

[80] Ex. 62-B, pp. 89-93.

[81] Ex. 62-B, pp. 105-106; Ex. 13, p. 222.

[82] Tr. 2228-2229, 3159-3160.

[83] Ex. 13, pp. 219-220; Tr. 2150-2151.

[84] Ex. 62-B, pp. 89-93; Ex. 106; Tr. 2226-2227, 2357-2358, 3064-3065.

[85] Tr. 392-393, 412-414, 470-475, 783, 2395-2396, 854, 2329-2330, 1084, 1089, 3546-3547.

project. As indicated heretofore, the project was financed by a grant of public funds by the Public Works Administration and the issuance of revenue bonds by the City. The grant was for approximately $1,700,000, the bonds totaled $3,000,000. Of this total amount approximately $1,054,000 was for the purpose of retiring a previous issue of revenue bonds secured by all revenues from industries then or thereafter constructed on the public levee. The Federal Authorities conditioned the grant of public funds upon the prior firm commitment by reliable parties to purchase the revenue bonds. A commitment was obtained from an investment banking house which was firm on its face but which contained a time limitation which the proposed purchaser secretly realized could not be met. The banking house had insisted that the Union Pacific guarantee the income or that sufficient responsible tenants be committed to accomplish that purpose. The time limit did expire releasing the bond purchaser from its commitment to buy and the proposed purchaser refused to purchase unless the Union Pacific guaranteed the income. Rather than do this or see the project fail, the Union Pacific purchased the bonds. The sole security for the principal and interest of the bonds is the revenue from the industries located on the public levee of which the market is by far the largest. The lien is junior to necessary operating expenses. When the question arose as to whether the City could legally use the rentals from the market, free of the lien of the bonds, for the purpose of paying the Missouri dealers to move to it, the Union Pacific advised the City such a course was proper and the former's attorney appeared before the Kansas Supreme Court in the Quo Warranto proceeding (151 Kan. 1) urging the right of the City to prefer such payments to the payment of principal and interest on the bonds.

The evidence pointing toward the Union Pacific's connection with the payments by the City to the Missouri dealers, briefly summarized, is as follows: The estimated annual increase in revenues to the Union Pacific if the market is a success is in excess of $200,000.00 annually;[86] the Union Pacific realized the necessity of moving the entire

[86] Ex. 2, pp. 31, 52; Ex. 3, p. 23.

Missouri wholesale market to the new market;[87] it anticipated the probable necessity of paying the Missouri dealers to move;[88] it considered purchasing the property of one Missouri dealer's property, situated near the Missouri market having a value of approximately $75,000, in order to induce that dealer to move to the new market;[89] by moving the Missouri wholesale market to the new market it hoped to make easier the removal of other industries to the adjoining Fairfax district;[90] it realized that it (the Union Pacific) could not pay tenant shippers to move to the new market without violating the Elkins Act;[91] it assumed that tenant shippers could be paid by the City to move without violation of the Elkins Act;[92] its attorneys formulated plans by which funds could be obtained by the City for the making of payments to the Missouri dealers;[93] another of its officials presented and recommended one of those plans to the City officials;[94] that plan was adopted;[95] it assisted in carrying out that plan by assisting in negotiating the necessary contract with the tenant of the Cold Storage Plant;[96] it assisted the City in procuring the necessary legal authority to make the payments;[97] and after the funds were procured and the legal authority obtained by the City, the Union Pacific took a leading part in negotiations for the purpose of determining the amount of the payments to be made to the Missouri dealers. In addition to other financial interests, it was interested in the success of the market to the extent of its $3,000,000 investment in the revenue

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[87] Ex. 2, p. 46; Ex. 3, p. 3; Ex. 4, p. 8; Ex. 9, p. 1.

[88] Ex. 14, p. 32.

[89] Tr. 2495-2499, 4681-4682.

[90] Ex. 7, p. 40.

[91] Ex. 10, p. 48, Tr. pp. 389, 4585-4587.

[92] Ex. 10, p. 48, Ex. 12, pp. 10, 11, 14, 16, 17, 24, Tr. pp. 3285-3288, 4711.

[93] Ex. 13, pp. 10, 14.

[94] Ex. 12, pp. 19, 24.

[95] Ex. 62-B, pp. 89-93.

[96] Ex. 12, pp. 10-11, 17, 35; Ex. 13, p. 222; Tr. 663, 703-706, 3152-3279, 5355-5356, 5383-5419.

[97] Ex. 12, p. 33; Tr. 3303-3305, 3364-3365.

bonds and approximately $500,000 invested in rail facilities at the market.

From all of the evidence the following ultimate facts or conclusions of fact, as distinguished from conclusions of law, are established:

1. The Union Pacific and the City jointly promoted the market for the financial benefit of both.

2. When it became necessary to pay the Missouri dealers to move to the new market, together the Union Pacific and the City worked out the plan for the City to make those payments and together they set out to and are putting that plan into execution.

3. The Legal Department of the Union Pacific and of the City in good faith believed that the plan adopted would not result in a violation of the Interstate Commerce Commission Act (49 U. S. C. Sec. 12, Paragraph 1) or the Elkins Act (49 U. S. C. Secs. 41-43). The officials of the Union Pacific and the City acted upon that opinion in good faith and with the belief they were not violating the law, adopted the plan and are attempting to execute it.

4. The nature of the business of the Missouri dealers who are to be paid to move to the new market is exclusively the transportation, purchase and sale of products almost all of which are transported in interstate commerce by rail.

5. The primary purpose of the City for making the impending payments to the Missouri dealers is to make the new market a success by the elimination of the Missouri wholesale market.

6. The primary purpose of the Union Pacific in promulgating and carrying out the adopted method of paying the Missouri dealers is likewise the success of the new market. Its interest in the success of the market is twofold. First, the additional revenue to be derived by it, and, Second, the protection of its investment in the revenue bonds.

7. If the payments or concessions are made to the Missouri dealers those dealers will receive an advantage in carrying on their business of shipping products in interstate

commerce by rail over other dealers at the same market and elsewhere, equal to the amount of those payments or concessions.

The proposed payments to Missouri dealers to induce them to move to the new market not being made to all tenants at the new market and being in the nature of bonuses the amount of which was not based on actual loss or expense, fall within the classification of discriminations prohibited by the Elkins Act. As stated in the syllabus of United States *v.* Union Stock Yards Co., 226 U. S. 286:

"A shipper receiving a bonus from the carrier for erecting a plant on the line of the carrier has an undue advantage over a shipper not receiving any bonus or a smaller bonus."

The prohibition of the law applies to any person or corporation whether carrier or not and prohibits the act which produces the forbidden result. Hence, it is not necessary that the carrier make the concessions. The City may not make concessions to shippers if the result is discrimination among shippers relative to interstate transportation.

In construing the Elkins Act in Spencer Kellog & Sons *v.* United States, 20 F. (2d) 459, l. c. 461, the scope of the Act was thus defined:

"Its broad and sweeping language is a clear expression of the intendment of Congress to make the purposes of the Act applicable to any person or corporation who might be in a position to commit an act which would accomplish the forbidden result, namely, the transportation of property at less rates than those named in the tariffs published by the carriers. * * * The purpose of the act was not to regulate carriers or shippers. Congress intended to prohibit all rebates, concessions, or discrimination with respect to railroad transportation service. This was not confined to the regulation of carriers and shippers. * * * It was not intended and does not permit any one else, other than shippers and carriers, to grant rebates or concessions. * * *"

The City stoutly maintains that so long as its primary motive is to secure tenants and not to divert traffic to the

Union Pacific, the violation of the purpose of the law may not be restrained. It bases that argument upon the premise that the statutory law as construed by the highest court of the State authorizes it to obtain tenants in the manner stated. Such assertion takes no cognizance of the fact that the Constitution of the United States is controlling and by it Congress is given exclusive power to regulate interstate commerce. Under that Constitutional authority Congress may and has by the Elkins Act provided that neither the City of Kansas City, Kansas, nor any other corporation or person may for any purpose make concessions which *result* in discrimination between *interstate shippers*. The language of the Act is explicit—"* * * it shall be unlawful for any person, persons, or corporation to offer, grant or give * * * any * * * concession, or discrimination in respect to the transportation of any property in interstate * * * commerce * * * whereby * * * any advantage is given or discrimination is practiced." Because in many of the reported cases the Elkins Act has been invoked to prevent carriers from giving concessions to shippers in order to secure their business to the disadvantage of other carriers, the City seems to assume as a fact the fallacy that the only purpose of the Act is for the *carriers'* protection. When that purpose of the Act, applicable here, i. e. the prevention of discrimination among shippers is considered, it is readily apparent that the Act may be violated by one not a shipper or carrier when discrimination is produced between shippers, regardless of whether the intention is to prefer one carrier to another.

But the discrimination must be "in respect to the transportation of (any) property in interstate commerce." Ordinarily, a landlord may with impunity and without hindrance by the Elkins Act, offer or grant any concessions it wills to persons engaged in the business of transporting property in interstate commerce to induce such person to become its tenant. It could not be suggested with reason that the City owning an office building might not (statutory authority existing) make a cash payment to one engaged in a business similar to that of the produce dealers to become its tenant. In such a case the City as the landlord

makes no requirement that the tenants' business be such that the payment must necessarily and directly reduce shipping charges to be paid a common carrier. It is suggested that in no event can a payment by one not a carrier be in respect to transportation because the tenant is free to use the payment for any purpose he will and not connected in any way with tariff rates. That argument is only partially correct. In any case where the person making the payment does so under circumstances and conditions which do not *require* as a result that the payment directly affect the amount of tariff charges to be paid, the payment cannot be said to be in respect to transportation with resulting tariff discrimination. But where the terms of the grant or the circumstances under which it is made are such that the necessary and required result of the grant is to reduce the amount to be paid for transportation charges, the payment is in respect to transportation. In United States v. Union Stock Yards, 226 U. S. 286, the argument was advanced that the payment of $50,000.00 to a packing company to induce it to erect a packing plant adjacent to the carriers rail facilities was not based upon the transportation of property and had nothing to do with rates charged or paid, l. c. 293. After determining that the grantor was a carrier and coming to the question of whether the payment was an unlawful discrimination and *a fortiori* in respect to transportation, attention was directed to the fact that the contract under which the payment was made required that the packing company ship over the carrier's lines and pay the regular tariff rate. Nothing appears in the opinion as to whether the money paid was to be used for any specific purpose. It is to be assumed that there as here there was no requirement that the payment was required by contract to be used for the payment of freight rates. It was assumed there as it must be in this case that the furnishing of funds with which the shipper could pay freight charges was sufficient to bring about discrimination in favor of that shipper *with respect to transportation* if the shipper was required as a necessary result of accepting the payment to engage in transportation. In the Stock Yards case the contract furnished the necessary connection between the payment and transportation by requiring that

the donee ship over the donor's lines. The interest of the donor in making the payment in that case may be disregarded for the purpose of determining whether sufficient connection is produced by the result to make the payment one in respect to transportation since it is the result and not the motive which determines the lawfulness of the act,[98] and fraud or bad faith need not be present.[99] It seems reasonably obvious that the underlying and real ground for holding the payment in the Stock Yards case one in respect to transportation was the requirement of the contract, since the statement following relative to the interest of the carrier was merely the statement of additional facts indicative of the direct connection between the payment and transportation which the contract requirement had already established. The Stock Yards case, not involving the identical question presented here, possibly should not be controlling authority in this case. The somewhat searching examination of that opinion has been resorted to in order to emphasize and illustrate the principle now to be applied here.

By the very nature, design and location of that part of the market and connecting facilities which the City proposes to lease to the Missouri dealers to whom payments are to be made and to other produce dealers to whom like facilities are leased but to whom payments are not made, the performance of the payment contracts by the Missouri dealers requires them to move to the new market, and, by the occupancy of the leased premises, requires the result that they engage in interstate transportation. That part of the market to be leased to the Missouri dealers was designed for no other purpose, it can be used for no other purpose, and—referring to intent for the same purpose the Court had in doing so in the Stock Yards case—the City officials had or have no other intention in mind as to the purpose of occupancy than that the premises should be used for the sole and exclusive purpose of transporting products in interstate commerce over the lines of the Union

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[98] United States v. Hocking Valley Ry. Co., 194 Fed. 234.

[99] Armour Packing Co. v. United States, 209 U. S. 56, 72-73.

Pacific. The applicability of the Stock Yards case should become apparent. If, in that case, the contractual requirement that acceptance of the payment necessitated transportation was sufficient, coupled with interest indicative of intent, to so connect that payment with transportation that the concession was with respect to transportation, so must the requirement resulting from the type of the facilities, that the tenants of the facilities of the market here involved engage exclusively in interstate transportation over the lines of the Union Pacific, coupled with the intention of the City that they should do so, produce the result that the payments about to be made to those tenants are in respect to transportation. There can be no difference in principle between a contractual requirement and a requirement growing out of absolute necessity. The proposed payments are so definitely intended to be in connection with interstate transportation and are by all the physical facts so necessarily connected with interstate transportation that they are in "respect to transportation." That they constitute concessions resulting in advantages to those who receive them which others will not receive is obvious. That they are prohibited by the Elkins Act is clear from the following language of the Stock Yards case, l.c. 308:

"The Elkins Act makes it an offense for any person or corporation to give or receive any rebate, concession or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff or whereby any other advantage is given or discrimination is practiced."

But more impelling reasons exist for granting injunctive relief than those heretofore given. The evidence discloses that the new market, or Food Terminal as it has elsewhere been referred to, was conceived by the Union Pacific and DeOreo and Fean. It was promoted by them. The City joined in the enterprise for many good reasons heretofore noted. Messrs. DeOreo and Fean dropped out as proprietors of the enterprise and the project continued as the joint venture of the Union Pacific and the City. Until

the time came when the necessity for the proposed payments became obvious, the Union Pacific had advanced practically all of the necessary funds [100] other than the grant of public funds and funds furnished by the City for general improvement of the Levee. Then the time came for the making of the payments to the Missouri dealers, the Union Pacific knowing it could not legally make them said in effect to the City, its joint adventurer—"It is absolutely necessary that the Missouri dealers be moved to the Food Terminal. Here is a method by which we can pay them to move and avoid the letter of the Elkins Act. You pay them, I cannot. I will help you carry out all of the necessary details. Here is another plan by which you can get the necessary funds without cost to you. If it costs anyone anything it will be my loss and I will assist you in carrying out that plan also. Then when we get the necessary funds I will, with the assistance of two friendly prospective tenants, carry on the necessary negotiations with the Missouri dealers and you need do nothing other than formally make the payments."

The evidence clearly demonstrates that this arrangement was adopted and carried out with the exception that the City officials took a more active part and performed more of the actual labor than was necessary. Whether it be characterized as a joint adventure or a conspiracy is of little moment. Certainly, it was a device within the meaning of the Elkins Act which prohibits concessions—"by any device whatever."

"A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be 'that which is devised or formed by design; a contrivance; an invention; a project', etc." Armour Packing Company *v.* United States, 209 U. S. l.c. 71.

One additional question requires attention. It is alleged that concessions have been made by the device of having loans made by a friendly bank without adequate security. Although the testimony discloses that many loans have been

[100] In excess of $3,500,000.00.

made by that bank to prospective tenants, it does not show that those loans were made at lower rates of interest than customary or that it was not the intention of the borrowers to repay the loans. Other elements of favoritism are not shown. There was evidence tending to show that one of the loans may have been somewhat inadequately secured but the testimony does not warrant the conclusion that the loan constituted a concession. It is not a violation of the Elkins Act for a bank to make ordinary loans. Neither is it a violation of that Act for the City or the Union Pacific to make such loans or to guarantee their payment so long as unlawful discrimination or actual concessions are not given.[101] Obviously, the City has the statutory authority to guarantee the repayment of loans which it has the legal authority to make. State ex rel. *v.* Kansas City, 151 Kan. 2. If these loans are not concessions and the City officials have some understanding relative to their repayment in the event the borrowers fail to do so, that the City may and should do. But those obligations, if any exist, are not proper matters for determination here. If loans constituting concessions should be made, contempt proceedings will furnish adequate recourse.

A formal judgment conforming to the conclusions expressed herein will be entered. All requests for findings and declarations not incorporated in substance in the formal findings and conclusions of the Court will be considered refused. Exceptions allowed to all adverse rulings.

(Sgd.) J. C. Collet,
District Judge.

Dated at Kansas City, Mo., this 25th day of March, 1940.

(Filed in U. S. Dist. Court, W. D. W. D. Mo., March 25, 1940.)

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[101] S. W. Lbr. Co. *v.* Kerr, 11 F. Supp. 253, 78 F. (2d) 348.

APPENDIX "D".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

Civil Action. No. 440.

UNITED STATES OF AMERICA, et al., *Plaintiffs*,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., *Defendants*.

Order Granting Preliminary Injunction.

This cause came on to be heard upon application of the United States of America, City of Kansas City, Missouri, The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island & Pacific Railway Company, and Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, plaintiffs in said cause, for a preliminary injunction, and upon verified complaint of the United States of America, and on the verified answers of defendants, and upon the evidence introduced both by plaintiffs and defendants, and after hearing counsel for the respective parties, and memorandum opinion, findings of fact, and conclusions of law of the Court having been filed herein on March 25, 1940, and supplemental findings of fact of the Court having been filed herein on April 5th, 1940, and it appearing to this Court that the Interstate Commerce Act and the Elkins Act have been, now are being, and will be, violated by said defendants as alleged in said complaint, and that issuance of a preliminary injunction is necessary to prevent immediate and irreparable damage for the following reasons:

That at the present produce district of Kansas City, Missouri, certain produce dealers do business in a market building owned by the City of Kansas City, Missouri, and certain other produce dealers do business in privately-

owned stores, offices, markets, and warehouses, some of which are owned by the produce dealers themselves and some by other persons. The aggregate value of the buildings, public and private, devoted to buying and selling food in said produce is substantial. A great part of the value of said property would be destroyed and large losses would be visited upon the produce dealers and other property owners and upon the commerce and trade of Kansas City, Missouri, should the defendants proceed in carrying out their agreement by which the defendant produce dealers are to move their places of business to the new Kansas City Food Terminal at Kansas City, Kansas, in return for payments of cash and gifts of free rental and other things of value. Said injury would be irreparable because once the defendant produce dealers have moved away from the produce district of Kansas City, Missouri, to the new Kansas City Food Terminal at Kansas City, Kansas, it is probable that they will not assume the expense and trouble of moving back again even if at some subsequent time a return of the payments and gifts aforesaid were ordered by the Court.

The major portion of the produce bought and sold in the present produce district of Kansas City, Missouri is transported to and from said district in interstate and foreign commerce by a number of competing railroads, including defendant Union Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company and Frank O. Lowden, James E. Gorman and Joseph B. Fleming, its trustees, and Missouri Pacific Railroad Company and Guy A. Thompson, its trustee. The new Kansas City Food Terminal at Kansas City, Kansas, is located solely on the lines of defendant Union Pacific Railroad Company with one exception relative to service to the cold storage plant, and said defendant has an advantage over the above-named competing lines with respect to traffic handled to or from said new terminal. If the defendant produce dealers are induced to move their places of business from the Kansas City, Missouri, terminal to the Kansas City, Kansas, terminal the result will be to divert shipments of produce traffic of such defendant

produce dealers now being transported in interstate and foreign commerce from the said competing lines to the lines of the defendant Union Pacific Railroad Company, and such diversion would cause a loss of approximately $600,000 a year to The Atchison, Topeka and Santa Fe Railway Company, a loss of approximately $110,000 a year to the Missouri Pacific Railroad Company, a loss of approximately $60,000 a year to the Chicago, Burlington & Quincy Railroad Company, and substantial loss of revenue annually to the Chicago, Rock Island & Pacific Railway Company, and said loss and diversion will be a continuous one and one for which there is no adequate remedy at law.

It Is Ordered, Adjudged, and Decreed as follows:

First, defendants Union Pacific Railroad Company, City of Kansas City, Kansas, Don C. McCombs, Francis Blake, George T. Darby, Alton H. Skinner, Howard Payne, and Truman Schlup, and each of their respective officers, agents, attorneys, servants, and employees, and anyone acting by or through or for them, be and hereby are jointly and severally enjoined and restrained—

(1) From offering, granting or giving, or assisting, joining, or cooperating in offering, granting, or giving cash payments or rental credits, free rents and reduced rents, unsecured loans constituting concessions, or other valuable considerations to defendant produce dealers or other produce dealers, or produce brokers or other persons, firms, or corporations shipping produce by railroad in interstate commerce to move or for moving to the Kansas City Food Terminal or for leasing space or for remaining as tenants in said food terminal.

(2) From permitting defendant produce dealers or other produce dealers, or produce brokers or other persons, firms, or corporations shipping produce by railroad in interstate commerce to remain as tenants of the wholesale produce buildings at the Kansas City Food Terminal unless said produce dealers, produce brokers, or other persons, firms, or corporations (a) shall pay rental monthly hereafter for all substantially completed units at the same rate

charged all other shippers occupying similar facilities and not less than $150.00 per month per unit until further order, and (b) shall pay rental monthly for occupancy, prior to this date, of all substantially completed units at the rate of $150.00 per month for the period when such units were substantially complete, and (c) shall pay rental monthly for past, present and future occupancy (pending final determination of this cause by this court) of units not substantially completed, at a monthly rate which is the same proportionate part of $150.00 per month which the per centum of actual utilization of those facilities bears to complete utilization of those facilities.

(3) From permitting defendant produce dealers or other produce dealers or produce brokers or other persons, firms, or corporations shipping produce by railroad in interstate commerce to remain as tenants of office space in the buildings of the Kansas City Food Terminal unless said produce dealers, brokers, or other persons, firms, or corporations (a) shall pay rental monthly hereafter for all substantially completed facilities and office space at the same rate charged all other shippers occupying similar facilities and not less than $1.10 per square foot per annum, until further order, and (b) shall pay rental monthly for occupancy prior to this date, of all substantially completed facilities and office space at the rate of $1.10 per square foot per annum for the period when such facilities were substantially complete, and (c) shall pay rental monthly for past, present and future occupancy of office space facilities (pending final determination of this cause by this court) at a monthly rate which is the same proportionate part of $1.10 per square foot per annum which the per centum of actual utilization of those facilities bears to complete utilization of those facilities.

Second, defendants Joseph DeOreo and William Fean, and each of their agents, attorneys, servants, and employees, and anyone acting by or through or for them, be and hereby are jointly and severally enjoined and restrained—

(1) From assisting, joining, or cooperating with, defendants Union Pacific Railroad Company, City of Kansas City,

Kansas, Don C. McCombs, Francis Blake, George T. Darby, Alton H. Skinner, Howard Payne, and Truman Schlup, and each of their officers, agents, attorneys, servants, and employees, and anyone acting by or through or for them, in offering, granting, or giving to defendant produce dealers and other produce dealers or produce brokers, or other persons, firms, or corporations shipping produce by railroad in interstate commerce, cash payments or rental credits, free and reduced rents, unsecured loans constituting concessions, or other valuable considerations to move or for moving to the Kansas City Food Terminal or for leasing space or for remaining as tenants in said food terminal.

Third, defendant produce dealers and each of their respective officers, agents, attorneys, servants, and employees and anyone acting by or through or for them be and hereby are jointly and severally enjoined and restrained—

(1) From soliciting, accepting, or receiving cash payments or rental credits, free and reduced rents, unsecured loans constituting concessions, or other valuable considerations from defendants Union Pacific Railroad Company, City of Kansas City, Kansas, Don C. McCombs, Francis Blake, George T. Darby, Alton H. Skinner, Howard Payne, Truman Schlup, Joseph DeOreo, and William Fean, and each of their respective officers, agents, attorneys, servants, and employees, and anyone acting by or through or for them, to move or for moving to the Kansas City Food Terminal or for leasing space or for remaining as tenants in said food terminal.

(2) From remaining as tenants of the wholesale produce buildings at the Kansas City Food Terminal, (a) without paying rental monthly hereafter for all substantially completed units at the same rate charged all other shippers occupying similar facilities and not less than $150.00 per month per unit until further order, and (b) without paying rental monthly for occupancy, prior to this date, of all substantially completed units at the rate of $150.00 per month for the period when such units were substantially complete, and (c) without paying rental monthly for past, present

and future occupancy (pending final determination of this cause by this court) of units not substantially completed, at a monthly rate which is the same proportionate part of $150.00 per month which the per centum of actual utilization of those facilities bears to complete utilization of those facilities.

(3) From remaining as tenants of office space in the buildings at the Kansas City Food Terminal, (a) without paying rental monthly hereafter for all substantially completed facilities and office space at the same rate charged all other shippers occupying similar facilities and not less than $1.10 per square foot per annum, until further order, and (b) without paying rental monthly for occupancy prior to this date, of all substantially completed facilities and office space at the rate of $1.10 per square foot per annum for the period when such facilities were substantially complete, and (c) without paying rental monthly for past, present and future occupancy of office space facilities (pending final determination of this cause by this court) at a monthly rate which is the same proportionate part of $1.10 per square foot per annum which the per centum of actual utilization of those facilities bears to complete utilization of those facilities.

Fourth, the defendant City of Kansas City, Kansas, shall file with the Clerk of this Court on or before the 25th day of April, 1940, a written statement showing all payments made by tenants occupying facilities at the Food Terminal, and shall thereafter on or before the 15th day of each and every month during the pendency of this action file a like statement for the preceding calendar month.

It is Further Ordered, Adjudged, and Decreed that this preliminary injunction remain in full force and effect until entry of final decree in this cause and until further order of this Court.

J. C. Collet,
District Judge.

Dated at Kansas City, Missouri, this 10th day of April, 1940.

(Filed in U. S. Dist. Court, W. D. W. D. Mo., April 10, 1940.)

APPENDIX "E".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

Civil Action. No. 440.

UNITED STATES OF AMERICA, et al., *Plaintiffs*,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., *Defendants*.

Order Granting Permanent Injunction.

This cause came on to be heard upon application of the United States of America, City of Kansas City, Missouri, The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island & Pacific Railway Company, and Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, plaintiffs in said cause, for a permanent injunction; and upon the verified complaint, as amended, of the United States of America; and on the verified answers, as amended, of defendants; and upon the evidence introduced both by plaintiffs and defendants; and after hearing counsel for the respective parties, and memorandum opinion, findings of fact, and conclusions of law of the Court having been filed herein on July 8, 1940; and it appearing to this Court that the Interstate Commerce Act and the Elkins Act have been, now are being, and will be violated by said defendants as alleged in said complaint, and that issuance of a permanent injunction is necessary to prevent continued violations of said statutes and to prevent irreparable damage to the City of Kansas City, Missouri, and to the plaintiff railroads.

It is Ordered, Adjudged, and Decreed as follows:

First, defendants Union Pacific Railroad Company, City of Kansas City, Kansas, Don C. McCombs, Francis Blake,

George T. Darby, Alton H. Skinner, Howard Payne, and Truman Schlup, and each of their respective successors in office, officers, agents, attorneys, servants, and employees and any person, firm or corporation acting by, for, through or under them, be and hereby are jointly and severally enjoined and restrained—

(1) From offering, granting or giving, or assisting, joining, or cooperating in offering, granting, or giving cash payments or rental credits, free rents, and reduced rents, unsecured or inadequately secured loans constituting concessions, or other valuable considerations to defendant produce dealers or other produce dealers, or produce brokers or other persons, firms, or corporations shipping produce by railroad in interstate commerce to move or for moving to the Kansas City Food Terminal or for leasing space or remaining as tenants in said food terminal.

(2) From permitting defendant produce dealers or other produce dealers, or produce brokers or other persons, firms, or corporations shipping or receiving traffic by railroad in interstate commerce to occupy or remain as tenants of the wholesale produce buildings or of other facilities at the Kansas City Food Terminal unless said produce dealers, produce brokers, or other persons, firms, or corporations—(a) shall pay rental for past occupancy of such facilities under the provisions of the temporary restraining order and the preliminary injunction heretofore entered in this cause, and (b) shall pay rental hereafter for such facilities at the same rate charged all other shippers occupying similar facilities at said Terminal, which does not amount to a rebate or concession to any tenant, and which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation. Provided further that nothing contained in this decree shall be construed to limit the City in the renting of said facilities to a unit basis; but in no event shall the rates of rental and charges prescribed for such facilities aggregate less than is hereinabove provided.

Second, defendants Joseph DeOreo and William Fean, and each of their agents, attorneys, servants, and em-

ployees, and any person, firm, or corporation acting by, for, through or under them, be and hereby are jointly and severally enjoined and restrained—

(1) From assisting, joining, or cooperating with, defendants Union Pacific Railroad Company, City of Kansas City, Kansas, Don C. McCombs, Francis Blake, George T. Darby, Alton H. Skinner, Howard Payne, and Truman Schlup, and each of their successors in office, officers, agents, attorneys, servants, and employees, and any person, firm, or corporation acting by, for, through or under them, in offering, granting, or giving to defendant produce dealers and other produce dealers or produce brokers, or other persons, firms, or corporations shipping produce by railroad in interstate commerce, cash payments or rental credits, free and reduced rentals, unsecured or inadequately secured loans constituting concessions, or other valuable considerations, to move or for moving to the Kansas City Food Terminal or for leasing space or for remaining as tenants in said food terminal.

Third, defendant produce dealers and each of their respective officers, agents, attorneys, servants, and employees, and any person, firm or corporation acting by, for, through or under them, be and hereby are jointly and severally enjoined and restrained—

(1) From soliciting, accepting, or receiving cash payments or rental credits, free or reduced rents, unsecured or inadequately secured loans constituting concessions, or other valuable considerations from defendants Union Pacific Railroad Company, City of Kansas City, Kansas, Don C. McCombs, Francis Blake, George T. Darby, Alton H. Skinner, Howard Payne, Truman Schlup, Joseph DeOreo, and William Fean, and each of their respective successors in office, officers, agents, attorneys, servants, and employees, and any person, firm or corporation acting by, for, through or under them, to move or for moving to the Kansas City Food Terminal or for leasing space or for remaining as tenants in said food terminal.

(2) From occupying or remaining as tenants of the wholesale produce buildings or of other facilities at the

Kansas City Food Terminal without (a) paying rental for past occupancy of such facilities under the provisions of the temporary restraining order and the preliminary injunction heretofore entered in this cause and (b) without paying rental hereafter at the same rate charged all other shippers occupying similar facilities at said terminal, which does not amount to a rebate or concession to any tenant, and which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation.

Fourth, the defendant City of Kansas City, Kansas, shall file with the Clerk of this Court, on or before the 15th day of each month, for the next succeeding twelve (12) months after the entry of this decree, or until this cause is finally determined on appeal, a written statement showing all rental payments made by tenants occupying facilities at the food terminal.

Fifth, that said plaintiffs recover from defendants, Union Pacific Railroad Company and The City of Kansas City, Kansas, their costs of this suit.

It Is Further Ordered, Adjudged and Decreed that this permanent injunction shall remain in full force and effect until further order of this court; that future proper requests or petitions for modification of this decree may be made by motion in this cause.

Dated at Kansas City, Missouri, this 13th day of July, 1940.

(S.) J. C. COLLET,
District Judge.

(Filed in U. S. Dist. Court, W. D. W. D. Mo., July 13, 1940.)

APPENDIX "F".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

Civil Action. No. 440.

UNITED STATES OF AMERICA, et al., *Plaintiffs*,

vs.

UNION PACIFIC RAILROAD COMPANY, et al., *Defendants*.

Memorandum Opinion on Final Hearing.

The parties have stipulated that the record made on the hearing of the application for the preliminary injunction is to be considered by the Court as a part of the record on final hearing. Although the issue on application for preliminary injunction is frequently stated to involve only the existence of probable cause for the issuance of the restraining order yet the facts then presented were developed with such completeness by all parties that practically no additional testimony was offered on those questions at the hearing on the merits. Since the evidence was weighed and the factual conclusions arrived at on the hearing on the application for the preliminary injunction reflected the greater weight of the evidence, the findings of fact and conclusions of law filed herewith are to a large extent repetitions. On the final hearing a substantial amount of additional evidence was offered relating to the rate of return earned from existing rental rates. The question as to whether those rental rates are so low that unlawful concessions result, has been seriously urged for the first time on the final hearing. For that reason findings and conclusions bearing on that question now appear for the first time.

Since the opinion filed at the time the preliminary injunction was under consideration dealt fully with the legal questions there determined, only those questions arising upon the final hearing will be considered at this time. Those questions may be briefly stated as follows:

(1) Does the Court have power to fix a minimum rental rate "until further order of the Court" in order to prevent future rental concessions, and

(2) Are the present rental rates so low that interstate shippers paying those rentals thereby receive concessions? Those questions may be briefly answered.

The Court has no power to fix permanent minimum rental rates even until further order of the Court. It may only enjoin rebates or concessions conferred by inadequate rates. While it may forbid the offering of such rental advantages as will constitute rebates or concessions, rate making is not a proper prerogative of the Court. Tank Car Co. *v.* Terminal Co., 308 U. S. 422. The present inquiry will be directed to the determination of whether existing conditions disclose a present violation of law. The legality of future conditions will be determined in the light of facts and circumstances then existing. It will not be presumed that future violations will occur.

In determining whether present rental rates constitute concessions and rebates the fair value of the property will be considered without regard to the source of the capital with which it was acquired. An overall net return of from 2% to 3% will result from 90% occupancy at present rentals after providing for operating expenses and a proper depreciation allowance on all depreciable property.

In determining what rate of return will constitute an intentional and unlawful rebate or concession with respect to interstate transportation, economic conditions generally in the community will be considered. The return realized on a particular enterprise will be considered only to the extent of its comparative similarity to the enterprise in question. Fair return, as that term is used in utility regulation, does not measure lawfulness. Nor is confiscation in its strict legal sense determinative of illegality. Only such rentals as will result in returns so meager that the owner would be unwilling to operate the property therefor, absent an improper motive, will result in unlawful concessions. And the conclusion of lawfulness or unlawfulness will be reached only after considering the nature of the enterprise,

the profits generally realized from like enterprises, the resulting incidental and collateral benefits, the use to which the improvement is to be devoted, and other related considerations.

While the Food Terminal was conceived and fostered by the Union Pacific and the promoters in conjunction with the City, the general nature of the enterprise is such that it is properly classified as one from which general benefits will inure to the entire community. Public markets have existed almost from the beginning of mankind. The recorded history of civilization is replete with references to the early custom of the sovereignty furnishing at little or no cost, a place where the articles of common use may be offered for barter or exchange. The Food Terminal is a modern and glorified development of the ancient market places. It is admirably adapted to the handling of foods of general daily need. A city or community possessing a utility such as this Food Terminal may well be considered fortunate. A city government with due regard for the well being of the community may in good faith conclude that the general good to be derived from such an enterprise justifies the exaction of less than the "full, fair return" in money to which it and public utilities financed by private capital is entitled to demand. Hence, "fair return" as that term is used in utility regulation, is not the criterion for determining the existence or absence of an unlawful intention to make a personal gift to tenants who are necessary to the success of the enterprise. The sum for which the City may lease its property and still avoid the charge of donating the use of that property may and should be governed to some extent, at least, by the resulting general public benefit which the City Government is obligated to advance.

Evidence of the return received from elevator properties located in the same community is of little if any value in testing the proper return which should be derived from the Food Terminal. The utilities are so radically different in so many respects that the comparison of revenues can serve no helpful purpose.

The current low rates of interest on securities of the class universally accepted as the exemplification of security are

to be considered, not as an absolute criterion, again because of dissimilarity in the purpose of the investors, and also because of the difference in the safety of the investment and other factors. Ordinarily, return from investment in Government securities may safely be accepted as the lowest return which an investor would voluntarily accept. For that reason, if the Food Terminal was not endowed with the characteristic of performing a general public good and was not owned by one who was properly chargeable with promoting that public good as well as conserving the investment, plaintiffs' assertion that the rate of return from the Food Terminal should exceed the current return on Government securities would receive application. But since, as noted, other proper considerations may and should actuate the City-owner in determining a proper return in this case, the return on Government securities will not control.

It is argued by defendants that the effect of B. & O. Ry. Co. *v.* United States, 305 U. S. 507, is an approval of a return that is merely compensatory. While that case may indicate such a conclusion on the part of the Interstate Commerce Commission, the Supreme Court merely approved the action of the Commission in forbidding rates which failed to compensate the carriers for actual cost of providing the facilities and did not pass upon the question of whether an order of the Commission requiring a return in excess of actual cost would have been proper, the latter point not being presented by the record.

What has been said will sufficiently indicate the theory upon which the conclusion is based that the present rental rates are not so low that they may be held to result in unlawful concessions.

A formal decree consistent with the conclusions stated will be filed.

(S.) J. C. COLLET,
District Judge.

Dated this 8th day of July.

(Filed in U. S. District Court, W. D. W. D. Mo., July 8, 1940.)

APPENDIX "G".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

Civil Action. No. 440.

UNITED STATES OF AMERICA, et al., *Plaintiffs,*

vs.

UNION PACIFIC RAILROAD COMPANY, et al., *Defendants.*

Supplemental Memorandum on Final Hearing.

Pursuant to the invitation of the Court the parties have submitted proposed forms of a final decree without, of course, in doing so waiving any rights theretofore preserved. With those suggestions of counsel additional arguments have been made and authorities cited on the question of whether the court may properly fix a minimum *rate of return.* Several authorities are cited by plaintiffs in support of their contention that a proper final decree should include the establishment of a minimum rate of return. Those authorities all deal with conventional utility rate cases in which confiscation was the primary issue. If this case was one of that character, those authorities would be controlling, but such is not the case. In rate cases where confiscation is the issue the regulatory body in the first instance and the Court on review is concerned, in the fixing of the rate, with the question of what will be proper for the future. Existing conditions and past experiences of the utility are considered not for the purpose of determining the propriety of present or past rates but for their value and bearing upon what future rates should be. In such cases the object being the ascertainment of what will be proper in the future, price trends, expert testimony of economists, as to probable future conditions and other related considerations bearing upon a proper conclusion of what the order for the future shall be, are all considered. The fact that these considerations which deal with

the future are of controlling importance in rate cases is illustrative of the declaration heretofore made that rate-making bodies and courts in such type of cases are not concerned with the past or the present but are dealing with the future. Therein lies the distinction between those cases and the case at bar. In this case the court is called upon to determine what present conditions are and whether those conditions constitute a violation of the law. As noted in the memorandum opinion heretofore filed, we are dealing now with the question of whether the facts show at present a violation of the law and not in suppositions as to what future violations may possibly occur. And while the order made in this case will enjoin future acts, such inhibition will be made in the light of the present facts and not be based upon the presumption of facts conceivable but not now existing. It is for rate-making bodies acting as the arm of the legislative branch of the government to fix rates *in futuro*. The court determines the existence or non-existence of a violation of the law upon existing facts.

For the reasons noted, the rate of return for the future will not be determined in this action.

(S.) J. C. COLLET,
District Judge.

(Filed in U. S. Dist. Court, W. D. W. D. Mo., July 13, 1940.)

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